No. 16128

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., a corporation, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., a corporation, and THE SALVATION ARMY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

This is no ordinary condemnation case. We read that the races of prehistoric mammals disappeared from the face of the earth because of their ponderous proportions. A 19-week jury trial such as this must likewise fall of its own weight. A decision of the United States Court of Appeals, for the Fifth Circuit in 1954, Gwathmey v United States, quoted hereafter, makes this clear, but in our case, an initial taking burgeoned into a monster which cannot survive.

Its footprint should first be noted. It is recorded in Volume VI of the Transcript of Record herein "Book of Exhibits", (thousands of tabulated figures), a print so huge that twelve men and women, good and true, became lost within it. Volume I depicts the origin and growth of the creature and Volumes II, III, IV and V trace its path through the jungle of expert testimony.

Appellants contend that aside from incidental errors, this case comprised so many extraordinary ramifications and attained such great volume as to deprive appellants of their right of due process of law at the hands of the jury and to take their property without just compensation.

The United States of America in its initial taking May 27, 1953, elected to condemn only the right of term occupation of the immense former Convair property in the City of San Diego. Its original complaint was confined to this. A second taking occurred over two years later, June 16, 1955, when full possession was taken and an amended complaint was filed for condemnation of fee titles. Judgment upon the jury's multiple verdicts was entered November 26, 1957. We thus have the spectacle of an action in eminent domain - in reality two actions consolidated over the protest of appellants - dragging through the United States Trial Court for a period of four and one-half years!

This complication was doubtless occasioned by a change of policy in Washington, D. C. and was supported by the learned trial judge in his honest belief that consolidation of all issues before a single jury was feasible and would result in a saving of the court's time and of

the taxpayers' money. Despite the outstanding diligence and capability of the trial judge it turned out to be at the expense of the property owners. Hence this appeal.

Trial before a jury commenced January 2, 1957, and was not concluded until May 27, 1957, a period of more than 4 months. The last 14 days were devoted to deliberation by the jury which finally brought in its verdicts for the defendants aggregating the sum of $3,819,780.

The court, counsel on both sides and the jury, throughout the trial made valiant effort to encompass the hopeless task of full comprehension, but they were unsuccessful. Neither the government nor appellants were satisfied. Both moved for new trial. The mistake which the jury admittedly committed with respect to Parcel X was so obvious that it could be attributed only to confusion of the jury to the detriment of the government, so a reduction from $30,000 to $8,000 was required by the court. It was simply impossible for a jury of laymen to masticate, swallow and digest the imponderable mass of facts, figures and law which was crammed down their throats in this single trial.

Like confusion must have operated to the detriment of defendants. Their motion for new trial was based upon the same grounds here relied upon. It was denied. Both sides appealed, but the United States has since dismissed its cross-appeal. Of course, appellants' basic grievance is that they did not receive sufficient compensation for the interests and title which the government took from them. This we attribute primarily to the sea of figures and overlapping evidence with which the jury

was inevitably submerged when it was called upon to hear and decide at one sitting the issues under the two different takings.

Appellants do not challenge the verdicts on the ground of insufficiency of evidence to support them. The evidence in the record, if properly received, would have supported verdicts for $2,000,000 at the bottom of the scale or $10,000,000 at the top. Our challenge is confined to the following assignments of error which will be discussed in two sections.

Section One relates to the insistence by the government attorneys and the trial court that all issues under both takings be tried at one time before one jury with a single set of verdicts.

Section Two relates to particular instances of admission and rejection of evidence, always to the disadvantage of appellants and correspondingly to the advantage of the government. Ordinarily, some of these subjects would be within the field of discretion of the trial judge, but in view of the underlying abuse of discretion in denying separate trials, we shall later argue that the cumulation of these rulings aggravates the overall denial of due process of law.

SECTION I: The trial court committed abuse of its discretion in the following particulars:

> By permitting plaintiff, over appellants' objection, to amend and supplement its original complaint and declaration of taking leasehold estates, only, by subsequent amendments and

supplements adding fee title estates thereto.

By failing to grant appellants' motion for separate and successive trials before the jury of the issues relating to leasehold valuation and the issues relating to fee valuation.

SECTION II: The trial court committed error of law in the trial before the jury in the following instances whereby proper factors supporting higher valuations of the subject property were withheld from the jury and improper factors were furnished to it, supporting lower valuations:

A. By admission of testimony of witness Hallock over appellants' objection, re cost of putting property in useable and useful condition for industrial purposes and instruction of the court that such cost might be considered as a factor in finding fair market value.

C. By sustaining objection to appellants' attorney Burrill's cross examination of witness Hallock, re suitability of the property for industrial purposes without repairs and rehabilitation.

C. By rejecting appellants' offer of proof of cost of reproduction of improvements, new, less depreciation, while admitting plaintiff's proof of cost of repairs and rehabilitation.

D. By admitting, over appellants' objection, the subject matter of Convair contracts and subcontracts 1947 to 1953 as detailed in Exhibit J,

while rejecting appellants' offer of proof of leases to Convair of the property during the same period.

E. By admitting over appellants' objection, evidence of Carlstrom's purchase price more than 7 years before taking of the fee title of the subject property.

F. By admitting over appellants' objection, evidence of Carlstrom's declarations of value of the subject property before a Board of Equalization more than 4 years before taking of the fee.

G. By rejecting the offer of proof by appellants of the fair market rental value between July 1, 1954 and June 30, 1955 of Parcel 5. Parcel 6, Parcel 7, Parcel 9-A and Parcel 9 X.

H. By rejecting appellants' offers of instruction to the jury on the subject of paragraphs A, B, C, D, E, F and G.

PROBLEMS RESPECTING RECORD

This court may readily appreciate the problems of appellants' counsel in designating the record for use on this appeal. No great difficulty is involved in connection with the specific assignments of error (Section Two) though a determined effort has been made there to bring up only enough to show the basis of the rulings and the prejudice suffered by appellants.

With regard to the more far-reaching and all-

embracing error claimed in Section One - the pyramiding of separate takings and the consolidation of issues and valuations - the reconciling of thorough coverage and conservation of this court's time and energy presented and still presents great difficulty. Since appellants' undertaking in this phase of the case is to portray here the herculean burden imposed upon the jury and the human impossibility of fair comprehension of so many issues by the jurors, the first impulse is to hurl upon this court, the same full volume of the avalanche which the trial judge precipitated on a helpless jury - some 7465 pages of testimony and instructions, with some 500 exhibits.

Such a record would obviously be the most direct, but also the most tedious means possible, of making our point. It required a period of four months to marshall the evidence and fourteen days for deliberation by the jury. Granting the ability of this court to cover the same ground in half the time, or a tenth of the time, it would still be an imposition for us to demand such detailed study and analysis.

Our conclusion is, moreover, that it is unnecessary. We deem it to be sufficient to present a bird's-eye view of the combined proceedings. This should afford sufficient comprehension of the bulk mass, the ramification of interests, the multiplicity of legal principles, the diversity of estates and the irreconcilable range of expert valuations. It is not our purpose on this phase of the appeal to decipher what the jury should have found or should not have found. We seek only to portray the only alternative which was left open to the jury in view of the orders and instructions of the court - to make the best guess possible.

Again we take occasion to express our sincere admiration for the trial judge, Honorable James M. Carter, in his conduct of the case. His patience, tact, legal ability and indefatigable attention to detail stand forth throughout the record. Our only criticism is that he undertook to measure the capabilities of the jury by the same high standards which apply to himself.

Rather than to embody in the briefs appellants' own version of the undertaking upon which he launched the jury at the beginning of the trial, we have reproduced in the Printed Transcript of Record the opening statements of respective counsel. (TR. p. 375-446). It is our feeling that upon conclusion of these (if not before), the learned judge should have realized the enormity of the demands upon a group of laymen, and should have granted appellants' motions for separate trials and independent verdicts. (TR. p. 45-48). With all our admiration for the trial judge, it was doubtless too much to expect of him that after trial had commenced he would recede from his initial decision to wrap the whole affair up in a single hearing.

Pursuant to the policy above mentioned, we shall have to deal to some extent in generalities and bare references to the printed record. We shall not attempt to differentiate amongst the several appellants. They have common concern in the chief points at issue. Mr. Carlstrom's interests are interwoven with those of all the others, so with the court's permission, we shall refer to all appellants collectively. We shall use round figures in place of precise ones - largely in millions or hundreds of thousands of dollars.

Many pages of the transcript of record are devoted to reproduction of pleadings, instructions and exhibits which are not strictly necessary for consideration of the issues on this appeal. For example,the form and sufficiency of the Complaint in Condemnation (TR. p. 3), the First Amended Complaint (TR. p. 9), The Answers, (TR. p. 15), the Findings of Fact, Conclusions of Law and Final Judgment (TR. p. 255-300) and the like, though required under the Rules of Court, have no great significance. They reflect the usual form of condemnation proceedings. The vice is not in the content of these documents but in the multiple reflections which are engendered by the combination of takings involved, takings widely separated in points of time and in nature of the estates involved.

The following tabulation of the jury's verdict shows the ultimate destination arrived at by the jury (TR. p. 260-263):

JURY VERDICT ON 14-MONTH TERM AND OPTION TO RENEW:

Parcel No.	Fair Market Value of 14-Month Term	Fair Market Value of Option to Renew
5	$ 62,000.00	$ 17,712.00
6	185,000.00	52,856.00
7	202,000.00	57,684.00
9-A	315,000.00	90,000.00
9-B	700.00	200.00
X	12,000.00	3,428.00

JURY VERDICT ON FEE TAKING:

Tract No.	Fair Market Value
A-100	$ 275,000.00
A-101	1,146,000.00
A-102	2,830,000.00
A-106	30,000.00
A-107	49,000.00
A-108	122,000.00
A-109	195,000.00
A-120	22,000.00
A-121	208,000.00

JURY ANSWER AS TO 14-MONTH TERM ACQUISITION ON ENHANCEMENT OF PARKING FACILITIES:

Parcel	Amount
5	$ 1,600.00
6	8,600.00
7	9,550.00
9-A	10,850.00
9-B	100.00
X	405.00

JURY ANSWER AS TO FEE
ACQUISITION ON ENHANCEMENT
OF PARKING FACILITIES

Tract	Amount
A-100	$ 7,500.00
A-101	49,600.00
A-102	111,500.00
A-106	700.00
A-107	1,300.00
A-108	2,400.00
A-109	5,400.00
A-120	300.00
A-121	1,700.00

JURY ANSWER AS TO UNITIZATION
ON TERM TAKING:

"In the term and option taking, was there a reasonable probability of the unitization of all the parcels except Parcel 1, as of the date of the taking on May 1, 1953, or in the reasonably near future thereafter?

YES _____

NO __X_____ "

JURY ANSWER AS TO UNITIZATION
ON FEE TAKING:

"(1) In the fee taking, was there a reasonable

probability of the unitization of all the tracts in the fee taking except Tract A-100 at the date of taking on June 16, 1955, or in the reasonably near future thereafter?

YES X

NO _____

(2) In the fee taking was there a reasonable probability of the unitization of all the tracts, including Tract A-100 on the date of taking on June 16, 1955, or in the reasonably near future thereafter?

YES X

NO _____ "

THE MEASURE OF DUE PROCESS

While engaged in the attempt at simplification and reduction to fundamentals, may we be indulged in a few reminiscences on the origin of condemnation and the tests of due process of law.

In its beginning a sovereign would take a man's house and lot or his farm, and a judge or jury of his peers, that is, his neighbors, acquainted with the land and with local values, would be called upon to fix the compensation. The procedure was simple, direct and fair. Far removed was the procedure in the present case where the members of the jury were unacquainted

with actual values and were furnished with no adequate information of comparable sales or leases; where the only figures available were supplied by hired experts, one group seeking to inflate values to the benefit of the owners and the other seeking to deflate them to the benefit of the sovereign.

Perhaps the necessity of abandoning original concepts of condemnation procedure is inevitable; perhaps the convenience of governments and court unavoidably imposes delays of many years in the condemnation process; perhaps the sovereign and the owner must submit to the measure of value furnished by the most persuasive of paid advocates. Especially then, should the court take pains to simplify and segregate issues insofar as possible in order to minimize "benefits" to one side or the other and to guarantee full comprehension and discrimination on the part of jurors.

Due process of law is not afforded merely by following the forms of pleadings and routine trial. As applied to proceedings in eminent domain we not only rely on the decision in Gwathmey v. United States, cited herein, but on the rules summarized in the text of Nichols, The Law of Eminent Domain. From Chapter 4 of Volume 1, we quote the following:

> "It is universally agreed that the phrases 'due process of law' and 'law of the land' are synonymous and that both terms mean the same as 'due course of the law', 'due course of the law of the land', 'course of the common law' and the words 'conformably to the laws'. All of these constitutional limitations on the power of governments stem from

that lodestar of all Bill of Rights, the Magna Carta, wherein it was provided that 'No freeman shall .. be desseized .. unless by the lawful judgment of his peers or by the law of the land." Nichols, Vol. 1 page 273-293

". . We have, therefore, the rights of the sovereign and the rights of the individual in diametric opposition to each other. On the one hand we find the sovereign vested with the inherent right of Eminent Domain. On the other hand we have the individual vested with the equally inherent and fundamental right not to be deprived of his property without due process of law. The conflict has been resolved both at common law and under constitutional law in favor of the right of the individual to the extent that the exercise of the power of Eminent Domain is limited by the inhibition against depriving a person of his property without due process of law."

" . . However, it may be pointed out that since the individual holds property subject to the sovereign's right of Eminent Domain if the power is properly exercised pursuant to statutory authority and in compliance with established requisites, therefor, it constitutes due process." (Nichols, p. 298)

" . . As to Judicial Proceedings. Insofar as judicial proceedings are concerned, 'due process' means law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights." (Nichols, p. 301)

" . . Various definitions have from time to time been announced. "Due process of law" in each particular case means such an exertion of the powers of government as the settled maxiums of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxiums prescribe for the class of cases to which the one in question belongs." (Nichols, p. 302)

" . . Various other definitions have been from time to time announced by various courts and writers, as follows: 'A trial according to some settled course of proceeding.' 'Judicial proceedings according to the course and usage of the common law.' 'A trial by court of justice, according to the regular and established course of judicial proceedings.' 'Process due according to the law of the land.' 'Some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself.' " (Nichols, p. 303)

We shall first endeavor to demonstrate that the consolidation of issues and estates directed by the trial court, (at the insistence of the United States and over the protest of appellants) did not conform with prescribed forms or the settled course of proceedings, or usage of the common law, or the regular and established course of actions in Eminent Domain.

SECTION ONE

The Trial Court Committed Abuse of Its Discretion by Consolidating the Second Condemnation With the First Condemnation and Requiring a Single Trial Before a Single Jury

The first taking by the government involved a right of occupancy, the length of which depended on "options" exercisable by the government. This presented to the jury the value, as of May 27, 1953, of the use taken from the occupants for an indefinite period and the loss of rentals being received by the owners.

The second taking (of fee title) put a stop to "occupancy" and presented to the jury the value (two years later) of the fee title and the loss of the then remaining right of occupancy to any tenants in possession.

Long before commencement of the trial, namely August 23, 1956, defendants sought to clarify and simplify the issues and presented their motions for separate trials and separate submissions of issues. These appear in the printed Transcript of Record, p. 45-48. However, a more graphic and entertaining presentation is found in the stenographic reporter's record of pre-trial conference on the above date. (TR. p. 305-363).

This discussion was informal and frank, appellants protesting against a joint trial involving the taking of both the leasehold and the fee, and the government insisting upon it. Mr. McPherson, the able and experienced chief counsel of the plaintiff, in reply to Mr. Seltzer of

defendants' counsel, declared:

> "I agree with Mr. Seltzer's very candid statement that the verdict will be less in gross if the two terms are tried together than if they were tried with separate juries and separate verdicts taken on separate evidence in the entirety. There isn't any question about it. Anybody who contended to the contrary would not speak the truth to you, but why shouldn't the government have that benefit? Why should they expect you to give them something more than the fair market value, fixed by the Supreme Court of this country says it ought to be fixed?" (RT. p. 149, lines 5-13) TR. p. 353).

From the context (TR. p. 355-363), it is apparent that the learned United States Attorney was not in a mood to weigh too carefully the significance of this "agreement" with Mr. Sletzer. We venture to add our own concurrence to that of Mr. Seltzer and Mr. McPherson by asserting that it was of benefit to the government to lump all issues together and that thereby the gross award of the jury was materially reduced.

By this reference we mean no disrespect either to the government attorneys or to the trial judge. They were confronted with tactics passed down from Washington to them, and their sole purpose, beyond doubt, was to expedite the legal proceedings. Nonetheless, a disadvantage to appellants did arise when the government was permitted to combine a fee condemnation with a pending leasehold condemnation. This gives rise to our inquiry: By what principle of justice and by what maneuvering of pleadings is the government entitled

to deprive a property owner of a legitimate benefit before the trial begins? The Findings of Fact, prepared by the trial attorneys of the government contain, in addition to the names of the various active parties and their respective attorneys, a brief and accurate narrative of the preliminary maneuvering by the government. (TR. p. 256-259).

Had the original complaint been founded on the taking of the fee, the case would have been comparatively simple, although involving a great number of parcels and complicated factors of valuation. But in the end the jury merely would have found the fair market value of the fee title which would include all subsidiary interests and require no apportionment by the jury between occupation rights and ownership rights. It would have been the prerogative of the trial court to make division of the overall awards amongst owners and occupants. (Some of the property was under lease to other defendants). But where the government first chose to take only the right of temporary occupancy, enjoy it for a period of two years and then, by amendment and supplement in the same action, to throw all title and all interests into the hopper and compel one jury in one continuous session to grind out an impossible mass of detail not requisite to valuation of the fee - that was outside the bounds of due process of law.

The result was to deluge the court and the jury with distracting and confusing questions not directly pertinent to the fee titles and the fee valuations. Every day of the more than 100 days of trial period and every hour of the more than 100 hours of jury deliberation which were diverted to any other subject were most prejudicial to appellants.

Not only was the field of evidence opened wide, beyond all precedent, but it became so cluttered with exclusions and withdrawals that no juror could have known during deliberation whether or not the premises of his thinking were within approved precincts or entirely out of bounds.

We cite the following instances where evidence was received, passed into the consciousness (or semi-consciousness) of the respective jurymen and then was supposedly erased as in a clearing runback of a wire or tape recorder:

> "The jury will be instructed to disregard the reference made to the amount of the consideration originally passing between two of these parties." (TR. p. 1670)

> "The court has ruled that all those leases entered into after January 1, 1951, with the exception of one lease, which I will tell you about, are not to be considered as comparables and any testimony you have heard about them you are to forget about and we will run lines through them on Exhibit 25." (TR. p. 1754)

> "You will ignore any references to Parcels 110 to 118, inclusive. They are withdrawn from your consideration." (TR. p. 1805)

> "Now, what I am attempting to do is to tell you to strike from your consideration any testimony given by any of the witnesses, the defendants' witnesses, on the monetary value of these leases executed

"after January 1, 1951, except the lease No. 22, negotiated before that date." (TR. p. 1883-1884)

"The court, therefore, instructs you to disregard any reference to that percentage figure and to disregard the testimony of the witness in connection therewith as to that figure and to forget that you heard it and not to indulge in any speculation or any mathematical computations to try to find out what this reproduction cost new figure might be which the court has held that you should not consider." (TR. p. 1919)

"While I was talking to you yesterday and instructing you to disregard a certain percentage figure, I said too much; in one paragraph, on page 5268, I said, 'The court therefore instructs you to disregard any reference to that percentage figure' - that part is all right, and then I said, 'or any other percentage figure in connection with this case' is stricken out. You will disregard that, for the reason that there are various percentage figures in other parts of this testimony. I was directing my attention to a particular percentage figure." (TR. p. 1935)

"The jury will disregard the statements of counsel on both sides and will disregard my remarks in connection with ruling on this matter and forget that this ever happened. You have heard the testimony. You have seen the plant. You know almost as much about it as these men who sit here at the counsel table. Disregard the remarks of counsel on both sides and the court's remarks from your consideration." (TR. p. 2034)

"Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded." (TR. p. 2055)

"And before I forget it, when I enumerated the evidence in this case there was one other matter which is a matter of evidence, and that is the view you had of the premises. As carefully as we went over the instructions, we didn't include that, and that is part of the evidence in this case. But you will recall that it is limited to the physical buildings and not the activities contained therein; and you were told, also, to disregard the condition of the buildings on the ground that you would have to rely upon the evidence in this case, apart from your view, as to the condition of the buildings on May 1, 1953. So your view of the premises is also evidence in this case. (TR. p. 2057)

"You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you hadnever known of it." (TR. p. 2058)

"If you find and believe from the evidence that any of the witnesses have based their opinions as to fair market value upon assumed or potential uses which, while within the realm of possibility, are not fairly shown to be reasonably probable, you should disregard and exclude their testimony from your consideration to the extent you find and believe such witnesses were influenced thereby." (TR. p. 2079)

"The various prices at which portions of the subject property were leased have been admitted into evidence. The rental figures in the Convair leases after January 1, 1051, except Lease 22 on Exhibit 25-S, have been excluded and removed from your consideration." (TR. p. 2089-2090)

We do not cite these examples of impossible requirements imposed on the jurors as constituting error in admission of evidence in the first instance or in rejecting it in the second instance. They do suffice to illustrate the added confusion occasioned by the ambition of the government attorneys and the trial judge to encompass the subject matter of two or three trials in one before a single jury.

The jury members not only went into the jury room with the admonition that they remember all facts and figures submitted to them through the 119 day period of the trial, but they were further admonished to forget facts and figures designated by the court from time to time, which had already become a part of the consciousness. Not only did they have to remember what to remember, but they had to remember just what to forget!

It will be noted also that a subject termed "unitization" was submitted to the jury by way of special interrogatories. The difficulty and confusion inherent in this theoretical factor in valuation is well illustrated by the effort of the trial judge and various counsel to explain this to the jury during the testimony of witness Van Dyke (TR. p. 1016-1026) This interchange between the learned judge and counsel reflects the difficulties of memory and definition which must have been engendered

in the minds of untrained jurors throughout the whole trial. The court endeavored to instruct the jury on the subject at considerable length. (TR. p. 2098-2104; 2125-2128)

DIRECT AUTHORITY SUPPORTS APPELLANTS' CONTENTION OF WANT OF DUE PROCESS

GWATHMEY vs. UNITED STATES

We are not calling upon this court to pioneer in application of the Constitutional requirements for an action in eminent domain under circumstances such as those we have under consideration here.

The United States Court of Appeals, Fifth Circuit, on August 25, 1954 reversed a judgment based on a jury verdict and remanded an action brought by the United States of America affecting lands in the Cape Canaveral region: Gwathmey v. United States, 215 Fed. 2nd 148. Apparently no application was made by the government for review by the Supreme Court of the United States. Neither do we find any subsequent departure from or even judicial criticism of this ruling of the Fifth Circuit Court. It should, therefore only be required of appellants here to show on this appeal that the subject matter and procedure of the Gwathmey case were no more unusual and complicated than in our own case.

Actually the Gwathmey case was simple compared to ours, for the Carlstrom jury had infinitely more

opportunity for confusion and mistake. The Gwathmey taking was likewise in two parts, complaint being filed on one group of parcels April 15, 1950 and another complaint being filed on an adjoining group of parcels June 2, 1950 (less than two months later). The trial court consolidated the two actions for jury trial over protest of the defendant owners and on appeal this was held to constitute reversable error.

The area condemned comprised 12,000 acres, apparently of uniform nature except for some piers and docks along 50,000 feet of ocean front. The jury awarded $369,132 simple compensation for the 50 separate tracts owned by the group appellants. Note the multiplication of difficulties in our own case:

	Gwathmey	Carlstrom
Interval between takings	25 days	749 days
Pre-trial proceedings	2 days	16 days
Jury trial proceedings	7 weeks	17 weeks
Jury deliberation	3 days	15 days
Forms of verdict & interrogatories	1	7
Verdicts appealed	$369,132	$3,819,780

In our case one alternate juror was dismissed because of illness during the trial. After submission another juror became incapacitated and was excused; by stipulation deliberation continued with eleven. Appellants' chief counsel dropped dead after several weeks of trial. These are tragic illustrations of the physical wear and tear on all participants.

As stated in the Gwathmey opinion, the question

before the court was precisely the one which we present here: (all emphasis is our own)

> "But the principle issue and the main problem we deem it necessary to discuss, was raised by all appellants: Did the trial judge exercise a proper discretion first, in consolidating the two suits, and second, in refusing appellants' requests for separate trials and allowing the case to be presented before one jury which retired for deliberation only after all evidence of value had been entered on all property condemned." Gwathmey v U. S. 215 Fed 2nd 148 (p. 151)

The answer of the court is in this language:

> "....It is not necessary to emphasize the reasons behind the Constitutional provisions for trial by jury or the requirement that the Government must pay 'just compensation' to owners when their property is taken for public use. Jury trials were instituted long before the courts were confronted with modern conditions affecting the value of property. However, the reasons for having a jury now in such proceedings are the same, i. e., obtaining the composite judgment of twelve men on the relevant facts. To insure impartial judgment the trial should be conducted in a manner that will enable the jury to understand and comprehend those facts, not alone as to the overall value of a large body of land, such as was involved here, but as to the approximate worth fairly determined of each owner's tract or tracts, including all elements which reasonably contribute to its current market

value (p. 152) .... To expect an untrained layman in the first place to know the important points, and in the second, to be able to record them comprehensively, and to keep them intact while handling them each day, (at the end of which they were turned over to the Clerk) requires a good deal of faith in the diligence of an average individual serving as a juror. It is not out of place for us to suggest that had these cases been tried by the judge without a jury in the same manner as was done here, he most likely would have required the court reporter to transcribe at least the most important parts of his notes, especially as to closely contested and widely varying testimony of witnesses of equal credibility and knowledge, and that considerably more time than the three days used by the jury would have elapsed before a final decision.

Government appraisal witnesses broke the whole area down into 'value zones', a procedure which they said was necessitated by the magnitude of their task. Aside from the obvious result of arbitrary assignment of tracts to particular zones, this device added greatly to the confusion and to the mass of evidence with which the jury was burdened. Each such witness explained in detail how he arrived at the zones used, the factors which resulted in the values he placed on each zone and the effect of the zoning on the value of individual tracts therein. Without exhaustive quotation we cannot illustrate the problem created by the use of such zones. It should suffice to say that when the cumbersome procedure of trial was further complicated by testimony so organized, the jury was simply swamped

by an incredible volume of figures and general data. (p. 154)

".....The record shows plainly, we think, that the very size of the case as tried, without the additional complexities, was such that the jury must have been overwhelmed.
In fact, during the trial there were so many tracts and so much evidence that the witnesses, the attorneys and even the judge himself seemed to be confused at times. (p. 155)

".....They, of course did not have the transcribed record and had to rely entirely upon their recollection of the testimony of values as to those tracts that were left, with such aid as their notes might afford. When furnished with the forms of verdict containing the names of owners and numbers of tracts remaining it is most probable that there were differences in both the notes and recollections of individual jurors. . . . The task was so overwhelming they must have used whatever method of computation or approximation of values seemed reasonable to all twelve." (p. 156)

".....Of course, value was purely a jury function when based upon an informed opinion, but because of the manner in which these consolidated cases were tried, we do not believe it was humanly possible for the jury to have a really informed opinion; and it was driven to some other device in selecting the figure. Each owner was entitled to present for the consideration of the jury all of the relevant facts and circumstances which reasonably

tended to support his valuation in a manner that they could comprehend, without being confused with others having conditions and elements distinctly different. Even if such a fair hearing should produce little difference in the ultimate outcome, it would at least afford due process, which we do not believe was possible in the circumstances under which these consolidated cases were tried. The figures have the appearance of being largely guesses; and even if it be true, as is often said, that any valuation is at best an opinion or guess, still when the pertinent facts and figures are presented in a manner that the ordinary layman can understand, his guess is at least an informed one. (p. 156)

". . . As we have said, the desirability of minimizing the length and expense of the proceedings is self-evident; and due consideration of those factors is not only permissible but essential. Even so, the primary consideration is the individual landowner's Constitutional right to due process and just compensation. Any procedure calculated to save time and expense must at the same time substantially guarantee that the landowner has a fair opportunity to have his compensation determined from the evidence in reasonable proceedings. As between a method of procedure which seriously restricts or prevents the landowner from establishing his claim in order to save time and costs and one which preserves those fundamental rights, the choice is obvious and all reasonable doubt should be resolved in favor of justice. (p. 156)

".... Whether or not there has been an abuse of

discretion, whether or not there has been a denial of due process, are questions which turn on the circumstances of each case. In the Coast Line case, this court found 'no such confusion or prejudice to have resulted as would show an abuse of discretion'. Here, we are of the opinion that the trial court was so impressed with the desire to save time and expense that its failure to require a reasonable breakdown of the trial prevents the landowners from obtaining a fair determination of values by the jury and was therefore an abuse of discretion." (p. 157)

".....The practice in some districts where the Government seeks to condemn in a single suit a large body of land belonging to many owners, is to list separately each owner and his lands and to try the claims one at a time after which the jury retires and returns a verdict while the evidence is fresh in their minds, without being mixed up with other claims. Then other owners and their lands are handled in a similar fashion before the same jury, or another if desired and approved by the court. However, if the same jury is used, it has the benefit of the evidence in the preceding case or cases as well as the values which were previously used, where they are pertinent; and frequently counsel agrees that such evidence need not be repeated, thereby saving time. Conceding that more time is required, it cannot be argued that because the Government, or any other body exercising the powers of eminent domain, sees fit to include in one suit the whole area desired, involving hundreds of property owners, the court is justified in denying

the same full and fair treatment which would be given a single owner. When the element of time is considered, it is well to remember that a proceeding of this kind is not initiated by the defendant landowners but by the Government or other Agency having the power to condemn which usually wishes to get the property as cheaply as possible; whereas the owners naturally insist upon receiving what they claim is fair value. The court has the right to use all reasonable means to expedite such a trial, so long as it does not seriously curtail or deny fair treatment. Here, if the court had acceded to the request that the cases be broken down into not less than four trials of separately grouped properties of similar type and conditions, with verdicts following each trial, at least some of the confusion would have been avoided." (p. 157)

CONFUSION AND UNCERTAINTY WAS INEVITABLE

It happens that in our own case we are not required to indulge in surmise concerning the actual confusion in the minds of the jurors. This is conclusively demonstrated to the tune of $22,000 in a single parcel. The amount of the verdict which they rendered as the fee value of tract A-106 was $30,000. Since the most favorable testimony of value on this parcel was only $8,000, the Government presented its motion for new trial as to that item. The jury more than trebled the highest value given by anyone to the tract. In common honesty the motion could not be opposed, so the court invited remittance of $22,000 by the judgment creditor

and granted the motion as an alternative to consent to such reduction. This has since been made.

It does not so obviously appear that the valuations given on other tracts and other interests were not in accordance with the evidence. However, the fallibility of the jury has been definitely established in this instance. It casts grave doubt on the capability of the members to grasp, to remember or forget, and intelligently to resolve the hundreds of complicated and subtle factors which entered into the other items of the verdict. It is, accordingly, just as likely that such confusion and mistakes lie hidden in the other lump sum verdicts. Some may have been in favor of appellants, some in favor of respondent, but whoever won or lost, overall, the result was a miscarriage of justice through failure of due process in the submission to the jury of too many trials, on too many interests, under too many contingencies, involving too many people.

We do not here undertake to picture in our own words the multitude of complications in our own case, requiring segregation of options, of rights of way, of extensions of lease periods, of railroad facilities, of cost of rehabilitation of improvements, of possibility of integration, etc. In lieu of that, we have brought up in the printed record the ramifications of the case as seen through the eyes of respective counsel at the outset of the Carlstrom trial. These appear in the opening statements of respective counsel from page 375 to page 446 of the Transcript on the subject of leasehold taking and from page 1686 to page 1692 on the subject of fee taking. Coming from able counsel as they did, these furnish much less tedious reading than does the actual

testimony of the witnesses which covered the same ground subsequently at interminable length.

The picture of the trial, as thus forecast, well justified the renewal of the previous objections of defendants to the trial of all issues and a single set of verdicts from a single jury. Although the Gwathmey case was cited to the court, the suggestions for separation and simplification were again overruled.

Volume VI of the Transcript of Record reproduces forty seven pages of tabulated values submitted to the jury. To this we add in our appendix (p. i) tables of valuations which are undoubtedly more accurate and complete than any notes made by individual jurors. They summarize the figures given in oral testimony to the jury by respective expert witnesses throughout seventeen weeks of trial. As examples of the tedious and baffling form of the oral questions and answers on the same subject the Transcript quotes from the examination of 14 witnesses. (The Clerk's Index Volume I page ix-xii) gives the respective names and Transcript page references.

The scope and magnitude of the subject matter imposed upon the jury cannot be fully realized except upon reading of the 6842 pages of Reporter's Transcript and analysis of the hundreds of documentary exhibits.

Unfortunately such a search would fail to disclose any real comparable leases or sales which either the witnesses or the jury members could adopt as standards of value as a nucleus for their thinking. Because of the enormity of each of the two takings by the Government

there had been no such local leasing or purchasing, and, we venture to assert, nowhere has there ever been such a double-barrelled combination of transactions. Appellants respectfully submit that in the present case there was such marked departure from the basic concepts of condemnation and abandonment of the customary standards of fair play as to require a reversal of the judgment below.

The Carlstrom jury was not even supplied with absolute dates for valuation but were called upon to relate backward certain values and to project others forward into the future.

They were required to speculate as to feasibility of "unitization" and to give valuations according to such possibility or impossibility.

They were required to forget or remember according to the dictate of the court.

Day after day their minds were swamped with the theorizing and advocacy of paid experts, who in the end, came up with overall valuations millions of dollars apart.

The jury was permitted only a "limited" view of the premises. (TR. p. 169) Because portions of them were in use in performance of Government contracts, they were taken on a two hour bus tour. (TR. p. 181)

SECTION TWO

- A -

The Court Erred by Admission of Testimony of Witness Hallock, Over Appellants' Objection, re Cost of Putting Property in Useable and Useful Condition for Industrial Purposes

The first witness called by the government was John E. Hallock, a civil engineer from the Los Angeles region. (TR. p. 672). It appeared that his firm had been employed by the Army Engineers in November 1953 to make a condition report in connection with the Convair property in San Diego. He and his crew spent several weeks on the job and came up with a voluminous report as to what, at that time, would be required to bring each of the buildings up to a normal standard for carrying on the operations of industrial or commercial work therein. (TR. p. 677) He brought with him to the witness stand an extensive portfolio of photographs taken in 1953, most of which were later admitted in evidence and received designation as plaintifs' D series.

Defendants' counsel objected to the introduction as follows:

> "Mr. Burrill: If your Honor please, then we wish to object to the introduction of each and all of the photographs that plaintiff proposes to introduce in this portion of the case upon the ground that the photographs, although they may be true, correct and full representation of the particular area that is involved in the photograph, are not a true,

correct and full representation of the entire property that is involved, and that the photographs of the so-called areas that are covered generally as to specific locations are of such a size that a comparable photograph of an entire area of which these photographs are a part cannot be adequately produced by the defendants; first, because we did not have an opportunity because of security regulations to take any photographs in the property either immediately following the takeover by the government or preceding that period, if we had known the exact day.

We particularly wish to object to the introduction of these photographs unless the jury is given an opportunity to view the premises so that they may gain an accurate impression of the general overall condition of the property as compared to these specific photographs.

Mr. Janofsky: Same objection, your Honor.

Mr. Horton: Same objection, your Honor."

(TR. p. 682-683)

The objections were overruled by the court, and the witness proceeded to testify, amongst other things, concerning the "specific defects" (TR. p. 689) which had been selected for photographing. (Later testimony showed that there had been no change in condition since the date of first taking, May 1, 1953).

Mr. Hallock spent several days on the witness

stand. Much of this time was spent in describing the 88 photographs of the D Series. These were admittedly taken to show deterioration or damage of hundreds of spots throughout the various buildings. Admittedly they did not portray the overall conditions. It was as if the jury were permitted to examine the various buildings through a telescope but the government took pains to direct and focus the instrument only on portions selected for their appearance of collapse or ruin!

Still more objectionable was the cost of repairs which the witness was permitted to assess against the respective portions. Hallock was not called as an expert appraiser to give his opinion as to market values. Apparently he was called as an expert archeologist to describe an ancient ruin and estimate the cost of restoration! He gave no figure as to the ultimate value with or without repairs. We cannot conceive that a mere muck-raker has a legitimate place on the witness stand in an action of eminent domain.

In the case of Kintner v. United States, 156 Fed. 2nd 5 it was held that evidence of the cost of repairs must be rejected as clearly irrelevant. The Court of Appeals held that admission of dollar costs constituted reversible error.

- B -

The Court Erred in Restricting Cross-Examination of Witness Hallock

Upon conclusion of his cross-examination of the Government's witness Hallock on various details of his direct testimony, Mr. Burrill of appellants' counsel undertook to cross-examine him regarding his testimony as to necessity of repairs and rehabilitation and the necessary expenditures therefor.

Mr. Burrill sought to test the credibility of Hallock's opinion that the aggregate cost of bringing the properties shown on plaintiffs' exhibit A to a condition where they would be useable and useful for industrial purposes would be $1,478,600. To do this he proposed to elicit from the witness admissions that the property was in fact useful for such purposes and had actually been used therefor for a number of years subsequently without material rehabilitation.

Government counsel objected and his objections were sustained by the court. The colloquy between counsel and the court took place in the presence of the jury and is reproduced on pages 996 to 998 of the Transcript of Record herein. It goes like this:

"MR. BURRILL: The purpose of the question, if your Honor please, is to test the credibility of the witness's opinion that these properties are not a useful facility for industrial purposes during the period of time that I inquired about.

"THE COURT: The objection is sustained. We are looking at the situation as of May 1, 1953. I permitted testimony to December 1953 with the foundation carrying it back to May. To open up a question of what had been done thereafter would be to multiply this case endlessly. We would then have problems as to how much of the work, if all, was done, why it was done; what judgment was used and what was done or what was not done. And none of it would be of assistance in judging the opinion of this witness.

"MR. BURRILL: Well, if your Honor please - -

"THE COURT: The mere fact that he might reach a different conclusion than some other man might reach doesn't add anything.

"MR. BURRILL: It seems to me, if the court please, that the witness's testimony in reference to a useful facility, his opinion is tested if the property has operated for almost four years without those things being done.

"THE COURT: Well, then we would have to take another week's testimony to see what the condition was of the Convair plant and spend a week having witnesses tell us now what is the condition and what has been done. We are not going to do that. We are going to determine what the condition of this plant was on May 1, 1953. If the whole plant fell in the ocean after that date it wouldn't make any difference in this case.

"MR. BURRILL: I agree, if that happened it would make no difference. But it seems to me it makes quite a substantial difference, particularly in our rental value, the question whether or not this property is a useful property for industrial purposes, whether or not these things have been done during that period of time. Now, it might be desirable to do certain things. It might be desirable or important in the fee question of the case. But as I understand it, this testimony is relating to both the rental period and is relating also to the fee period. And I assume that the witnesses for the Government are going to predicate some of their opinions upon the opinion of this witness. And it seems to me that I am entitled to test the credibility of this witness's opinion that certain things must be done to make it a useful property for industrial purposes, to find out whether or not it's operated for four or five years without it.

"THE COURT: The witness has stated to you in reply to your questions, Mr. Burrill, that this question of usefulness is a matter of degree. And he has given several examples which seem intelligent to me. And I think they were probably understandable to the jury.

"MR. BURRILL: I have to submit it for a ruling, then, your Honor.

"THE COURT: I have already ruled.

"MR. BURRILL: I didn't realize you had ruled on the question.

"THE COURT: The objection was sustained."

We have heretofore discussed the impropriety of forcing the attention of the jury on the scene of ruin and desuetude painted by the witness Hallock. Whether or not the court committed error in this connection we respectfully submit that it did commit error in denying to appellants the opportunity to show out of the mouth of this same witness while he was still on the stand that despite the defects which he had pointed out and the alleged requirement of expenditure according to his figures exceeding a million and a half dollars to put the premises in a condition "useable and useful for industrial purposes", they continued to be employed for just such purposes for a long time immediately following without expenditures of a million and a half dollars or any substantial fraction thereof.

We sympathize with the court's expressed determination to avoid "another week's testimony' on the subject. This government witness had already been on the stand several days. We submit, however, that the trial judge's anticipation of undue delay was premature. Mr. Burrill was entitled to an answer from Mr. Hallock. It could have been: "There was no such subsequent use of the premises," or, "No such use was made until a substantial part of the million and a half had been expended in making the requisite repairs and replacements." The court's prediction that it would take a week's testimony to ascertain what had been done and why, must have been taken by the jury as indicating his belief that the second alternative answer above was the one to be expected and that such was indeed the fact.

This was highly prejudicial. The owners were confronted with an unusual line of testimony in the direct examination of Mr. Hallock, not the opinions of an expert as to fair market values, but the opinion of an expert as to specific defects in the property. His whole thesis was that the defects were so prevalent and extensive as to leave the property unfit for customary industrial uses and that it could be made fit only by outlay of more than a million and a half dollars in repairs and replacements.

Admittedly the greatest value of the property lay in its suitability and availability for industrial uses. The crucial consideration for the jury became, "was it reasonably available and fitted for such use at the first date of taking?" What better and more instantaneous refutation of Mr. Hallock's opinion could be offered than an admission by that same witness that important and satisfactory useage ensued very shortly and continued for a long period contrary to the judgment and prediction of the witness?

Had the witness been required to answer one way or the other there still would have remained to the court the opportunity to sustain an objection at a later stage restricting Mr. Burrill's cross examination had it gone too far afield.

As the matter was handled it seems reasonable to surmise that the jury after examining Mr. Hallock's discount tag confirmed by their own observation of the general authenticity of the photographic selections made by Mr. Hallock, applied Mr. Hallock's discount to whatever other yardstick of valuation measurement they had

agreed upon and that their ultimate aggregate verdict was deficient at least in the sum of one and one-half million dollars.

- C -

The Court Erred in Rejecting Appellants' Offer of Proof of Cost of Reproduction of Improvements Less Depreciation

After the court had informally indicated to counsel that he would not permit introduction of testimony on the subject of cost of reproduction less depreciation, a conference ensued in which Mr. Burrill, counsel for appellants, offered to prove that Mr. Burlake would testify that the cost of reproduction new of the facilities as of May 1, 1953 would be $15,069,140 and that after subtraction of straight line depreciation, including functional depreciation and deferred maintenance, the market value would amount to $9,217,397. (TR. p. 1035-1037); that Mr. Burlake's testimony would cover only the facilities that were there on the property as of May 1, 1953 and would not include any properties which were not there. It would include production equipment. The offer of proof was limited to those properties owned by the appellants Carlstrom, Salvation Army, a California corporation and Assemblies of God as of May 1, 1953. To this offer Mr. MacPherson, counsel for respondent, objected on the ground that as a matter of law reproduction new less depreciation of a partial facility would never be admissible in evidence as proof of value either of rental or as of the fee. (TR. p. 1038) He waived objection as to the form of the offer. (TR. p. 1039)

Appellants contend that the offer was proper and that such testimony should have been received in view of the fact that no satisfactory comparable transactions either of leasing or sale were available and other means and elements of fixing value were also given to the jury. Such practice has been well recognized by several U. S. Courts of Appeal. Such rulings were in pursuance of a decision by the Supreme Court of the United States in an action for damages arising out of ships' collision. The court held that cost of reproduction as of date of valuation constitutes proper evidence to be considered in ascertainment of value as a measure of damage for destruction of property. It added that neither cost of reproduction new nor that less depreciation is measure or sole guide of market value. (Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 465, 45 U. S. 146)

Subsequently the Supreme Court in a condemnation suit brought by the Government held that separate trials on parcels or for individuals are not required and it approved an instruction to the jury to consider what the property did cost and what it would now cost. (Kohl v. U. S., 91 U. S. 267, 23 L Ed 449).

Subsequently the Seventh Circuit Court held that what a plant originally cost, what the owner paid for it at judicial sale, it not having been a sheriff's sale, and what it should cost to reproduce the plant less a fair depreciation, may all be considered but neither is to be taken as a fixed standard. This was a condemnation proceeding brought by the United States in connection with the Tennessee Valley Authority. (U. S. v. 2.4 acres, 132 Fed. 2nd 295)

In another condemnation case from the Fourth Circuit Court where a country estate was being condemned by the government, the court held that it was largely discretionary with the court to admit evidence as to reproduction cost. Such evidence was properly admitted and there was no error where the court gave instructions fully as to other factors of valuations. (U. S. v. Wyes, 131 Fed. 2nd 851)

In a condemnation of shipyards by the United States it was held in the Fifth Circuit Court that the cost of construction of shipyards was properly received if accompanied by evidence to show that such costs were reasonable. It was also proper to receive evidence as to cost of reproduction. (U. S. v. Savannah Shipyards 139 Fed. 2nd. 395).

- D -

The Court Erred in Rejecting Convair Leases, While Admitting Convair Manufacturing Contracts

Carlstrom purchased the property which had been declared surplus by the government in 1947 and took title in 1948. He leased out a few portions of it and sold a small part, but there had been no real activity in leasing or selling except for about 30 leases made to Convair. Most of these were executed about the year 1951 and some of the terms ran until after 1953.

After several weeks of the trial, defendants' counsel

offered these leases as proper subjects for consideration by their expert witness Van Dyke and also as direct evidence showing lease transactions with comparable property close to the time of taking. Government counsel objected and after protracted argument the court allowed the leases to go in only after all rental figures had been removed.

This was done in compliance with the government's contention that the 30 so-called Convair leases which commenced at the period of the Korean War arose out of necessity on the part of the government for airplane construction and that the rental figures were not arrived at by open, arms-length negotiations. At the time, Convair had a small amount of commercial operation for which the leased property would be convenient, but its real interest arose from the large number of defense contracts received from the government. These provided for compensation by the government to Convair on a cost-plus-fixed-fee basis. The government therefore urged that the United States was essentially the lessee and that the government should not be required to pay, upon condemnation, a value which it had itself created.

At the conclusion of the argument the court granted the government's motion to withdraw the leases with the exception of one, Exhibit 22. (TR. p. 1754)

The government had offered in evidence as a foundation for its objection to consideration of the leases, various contracts between Convair and the government for manufacturing military articles. These were entered into about the time of the execution of the leases. Appellants objected to such offer. The baffling upshot

was that the contracts were admitted and the leases were admitted -- with rental figures deleted except in one instance. The court's explanation to the jury regarding the lease exhibits was as follows:

"Now the court also ruled on the matter of the Convair leases. You will recall that beginning in 1948 and down to well into 1952, on Exhibit 25, which was the comparable lease sheet, the bottom half of it were leases on the subject property, and there was testimony, you recall, of Mr. Watts as to how certain leases after January 1, 1951 were entered into. Mr. Carlstrom was asked, under 42(b), if certain testimony he gave was true as to how the leases were entered into. The court has ruled that all those leases entered into after January 1, 1951, with the exception of one lease, which I will tell you about, are not to be considered as comparables and any testimony you have heard about them you are to forget about and we will run lines through them on Exhibit 25. It is not your business why the court rules, but the court ruled that they were not free and open market transactions because of the compulsion testified to by Mr. Watts and testified to by Mr. Carlstrom.

Incidentally, this doesn't eliminate all of the leases off Exhibit 25; just those after January 1, 1951." (TR. p. 1754)

"The various prices at which portions of the subject property were leased have been admitted into evidence. The rental figures in the Convair leases after January 1, 1951, except Lease 22 on Exhibit

25-S have been excluded and removed from your consideration." (TR. p. 2089, 2090)

Appellants respectfully submit that it was the duty of the trial court to admit all the evidence and exhibits respecting the Convair-Government contracts and the Convair-Carlstrom leases or else to reject all of it. The lease transactions covered the identical properties taken. They were almost contemporaneous with the first taking. Deletion of the rental figures constituted complete emasculation of appellants' offer and admission, at the instance of the government, of the Convair-Government contracts served no purpose whatever unless it was to impress upon the jury the sanctity of any operation in which the government incidentally participates.

Certainly there was no privity between Carlstrom and the United States at the time of execution of the leases. He never could have collected a cent of rent from the government. To give any materiality to these contracts between the United States and private parties it would have to be shown that the latter were virtually attorneys-in-fact or alter egos of the former. This was a question of law for the court and aside from adding to the confusion of the jury it was prejudicial error to pass the question off to the jury. The law relating to government connection with property involved in condemnation proceedings was fully and, we believe, correctly supplied to the trial court in appellants' Memorandum on Admissibility of Convair Leases which is reproduced in the Transcript of Record, page 83-99 and is hereby referred to.

Apparently the court was considerably impressed by the pronouncement of respondent's attorneys that the leases were not admissible because they were not free and arms length transactions. But it would seem to border on the ridiculous to foreclose a property owner from using in evidence of value a lease of the identical property made shortly before condemnation on the ground that the lessee obtained the lease by threatening to condemn if it didn't it! The owner might logically contend that too low a rental was thus exacted but it hardly lies in the mouth of the lessee to contend that too high a rental was exacted by virtue of his threat to condemn. This may be an example of "straight arm" tactics, but it does not destroy the "arms length" character so long as the property owner does not complain!

- E -

The Court Erred in Admitting Evidence of the Purchase Price Paid by Carlstrom

Over defendants' objection of remoteness the court permitted the government to bring before the jury the price which Carlstrom had paid the government for the Convair Plant. This consideration was agreed upon in 1947, seven years before the taking of the fee in this action. The price paid was $1,050,000.00. (TR. p. 1507)

It is impossible to overemphasize the significance which this figure must have held in the minds of the jurors. It was the identical property; it was a figure

comprehensible to the average mind. It stood out as the only undisputed sum of money mentioned by any witness in connection with a comparable property sale.

It must have been seized upon by the jury as a veritable floating log in the maelstrom of figures through which the members valiantly sought to battle their way. What a simple means of fixing a sum for award to the owner in a condemnation action! He paid X dollars; he held it Y years; he should receive an increase of Z dollars per year.

All the ratiocination of the experts, all the instructions of the court could not have obliterated this simple formula from the minds of eleven exhausted jurors. Renunciation of it by respondent could not substitute any other available yardstick. Denunciation of it could not supplant the curious course of human nature. Consciously or unconsciously the cost to Carlstrom in 1947 determined the cost to the government in 1955. We venture to assert that it is the single figure which all jurors carried in their minds to the juryroom!

What then? Was Carlstrom's cost a fair and acceptable standard? Was it for the court or for the jury to determine this? Did the admission of the evidence of cost-price in the face of the owners' objection indicate to the jurors that the court approved it as a proper basis for fixing of value seven years later in the swift-moving increase of San Diego real estate values?

To return, now, to the true significance and reliability of the "purchase price plus" method; as ably argued by government counsel in another connection, the

price paid is not a proper factor in and of itself. To be worthy of consideration it must be arrived at in an arms-length transaction, in an open market. Government counsel stressed this point at great length in its plea for withholding from the jury the rental figures in the Convair leases, (TR. p. 1740). There, the trial court, as a matter of law, excluded the lease prices of much later date than the Carlstrom purchase. There the jury was not permitted to pass on the claim of necessity on the part of the government. Yet the necessity of the government was more pronounced at the time of this sale. The War was over, millions had been sunk in acquisition of the land and construction of the so-called Convair Plant. America had been promised "No more Wars". The Plant was too enormous for any one manufacturer. The government had on its hands a veritable white elephant. Its bargain disposal offers went unheeded until Carlstrom came along. A sacrifice price was agreed upon.

In no sense was this an arms-length transaction. The government was under necessity to unload its investment. Carlstrom got it at a bargain because he alone had the foresight to envision the future value of the property for non-military uses and the courage to shoulder the white elephant himself. Though the jury was disposed to allow him what they probably conceived to be a handsome profit, they had no way of measuring the mental anguish involved in the venture, the difficulties and risks of financing it and the laborious years of management in holding it, up to the point where it could be cashed in on the sweeping upturn of the San Diego real estate market.

Whatever application the jury made of all this, the result was purely speculative and there would have been no necessity for it except for the improper admission of the original cost to Carlstrom.

It is true that the jury was given opportunity to reject the figure on the ground of its remoteness, but it is likely that they considered this as a matter of the calendar only. Actually, of course, the intervention of seven years in the rise of San Diego real estate values between 1947 and 1955 was the equivalent of the seventeen preceding years. Of this the trial court had judicial knowledge and it should have applied the bar of remoteness as a matter of law.

In a final effort to undo the prejudice suffered by improper admission of this line of evidence, appellants requested the following in final instructions to the jury:

> "Defendants' Instruction No. 41. You are specifically instructed to absolutely disregard the purchase price which was the consideration agreed upon when Mr. Carlstrom acquired the entire subject property on June 31, 1947. Such purchase price has no bearing upon the market value of the various parcels sought to be condemned in fee on June 16, 1955, because it is too remote in time and was made under market conditions which were entirely dissimilar to the conditions of the market on or about the date of the fee valuation. Consequently it would be unjust to the defendant property owners for you to base your verdict upon any consideration of this sale as being direct evidence of the fair market value of the subject

parcels as of June 16, 1955." (TR. p. 203)

This was not accepted by the court and the jury was left to its own devices. (TR. p. 2089)

- F -

The Court Erred in Admitting Evidence of Carlstrom's Declaration Before the Board of Equalization

Respondent was permitted to introduce in evidence certain petitions to the Board of Supervisors of San Diego County sitting as a Board of Equalization, signed by Carlstrom in July 1951 (Exhibit N, O). In these, Carlstrom sought reduction in the County Assessor's valuations of the Convair Plant which Carlstrom had acquired three years earlier. For this purpose he naturally belittled the value and emphasized the detractions inherent in the condition and usefulness of the premises at that time. Before the board he testified to like effect.

These assertions were admitted over defendants' objections on the ground that they were declarations of Carlstrom against his interest. Inasmuch as most of the properties were subsequently acquired by the other appellants, the court properly instructed the jury that the declarations of Carlstrom could be considered against Carlstrom but not against Childrens Aid Foundation, Inc., the Assemblies of God or the Salvation Army. Appellants memorandum concerning admission of

declarations furnished to the trial court on this subject is reproduced in the printed transcript page 101-112.

Here again is an example of the impossible discrimination demanded of the jury. At the time of taking of the fee in 1955 the charitable organizations were the owners of the bulk of the property. Carlstrom had left only one of the adjoining and similar tracts. Thus the government was demanding of the jury that it accept Carlstrom's 1951 declaration of value as to one house and lot but disregard it as to the similar house and lot next door! Inevitably the jury must have either paid no attention to Carlstrom's campaign before the Supervisors or it must have applied it to all the property which was owned by Carlstrom at the time, including that subsequently acquired by the other appellants.

We may speculate that the jury followed the first alternative. This would have been the proper course, but who can say that it was followed? The government's offer should have been denied by the court not only to avoid the ensuing confusion but because the subject matter of the equalization hearing was no proper criterion of subsequent value. The question before the jury was the true market value in July 1955, not what Carlstrom considered or declared it to be in 1951 for the obvious purpose of minimizing taxes. This had no more bearing on the question of subsequent market value than his possible boast the next day to a friend that he had a property there worth $10,000,000! Neither puffing or belittling by an owner has any effect on the subsequent true market value. This kind of negotiation talk is therefore not within the field of declarations against interest admissible in court seven years later. The

court should have ruled it out as incompetent testimony.

- G -

The Court Erred in Rejecting Appellants' Offer of Proof of Fair Market Rental Value July 1, 1954 to June 30, 1955

Appellants formally offered to prove by their appraiser Mr. Culver that for the lease period July 1, 1954 to June 30, 1955, their properties had a fair market rental value amounting to $1,390,500. The offer, objection and ruling of the court appear in the transcript, (pages 1439-1441) as follows:

"Mr. Janofsky: I have an offer of proof, your Honor, and it will take just a moment to make it. I would like to make it in order to preserve our record in view of some pretrial rulings.

"At this time, your Honor, I offer to prove on behalf of the defendant Assemblies of God that Mr. Culver, if called as a witness on behalf of the Assemblines, would testify that the fair market rental value of Parcels 5, 6 and 7, respectively, as of the first day of July 1954 ---

"The Court: July?

"Mr. Janofsky: --- that as of the first day of July 1954 and for the lease period July 1, 1954 to and including June 30, 1955, would be as follows: First, Parcel No. 5, $98,880; second, Parcel No. 6, $358,440; third, Parcel No. 7, $376,908.

"Now I would like to make a further offer of proof for the record, your Honor, in furtherance of my position that subsequent purchasers are entitled to be heard, and there I am speaking for the Southern California Children's Aid Foundation, Incorporated; that they are entitled to be heard and present evidence of fair market value, and particularly in view of the fact that on December 22, 1953 the Children's Aid Foundation became the owner of Building 27 and certain surrounding land, and on January 2, 1954 that the Children's Aid Foundation became the owner of Building 24 and certain surrounding land, all of which property is situated within Parcel 9-A.

"Mr. Janofsky: I offer to prove, on behalf of the Children's Aid Foundation, that that organization, by deed of December 23, 1953, did become the owner of Building 27 and surrounding land, and by deed dated January 2, 1954 did become the owner of Building 24 and surrounding land, and further offer to prove on behalf of said defendant, that Mr. Culver, if called as a witness on its behalf, would testify that the fair market rental value of Parcel 9A, as of the 1st day of July, 1954, for the period of July 1, 1954 to and including June 30, 1955, is the sum of $556,200.

"Mr. McPherson: To which proffer the plaintiff

objects, not as to the form in the matter but upon itself, as being irrelevant, incompetent and immaterial, and upon the further ground that the proffer, of necessity, is incomplete, since by virtue of the court's very correct ruling the rental value for all subsequent terms or portions thereof must be at the same rate fixed commencing August 1, 1953 and the value of the option, whatever it may be determined to be, is compensation in full for the fluctuating market.

"Of course, the defendant, as I understand it, is simply protecting his proffer for annual revaluation. Isn't that right?

"Mr. Janofsky: That is correct. And also preserving our record in regard to the court's ruling on subsequent objections.

"The Court: And you object to the first offer made upon the grounds heretofore stated and upon the record you have made.

"Mr. McPherson: Yes, I understood that the objection went to both, that all of the objections made on the pretrial to that evidence would be available to us here.

"The Court: All right, the objection is sustained..."

Such testimony was material not only in determination of rental values but as an important factor to be considered in determination of the value of the fee estates. Whether these additional figures would have

meant anything to a jury already bewildered, is questionable, but on the score of admissibility, these figures were just as valid and important as the thousands already admitted in evidence.

CONCLUSION

This brief of appellants opened with the observation that this is no ordinary condemnation case. We believe that Section I fully demonstrated that an American jury has never before been confronted with such a multifarious and complicated assortment of takings and issues. Not only to do justice to the appellants here, is a reversal in order, but it may well serve to prevent such impositions upon other juries in the future.

We believe further, that Section II demonstrates a cumulation of erroneous rulings by the court which may be attributed in some degree to the complexities of the case and the desire of all concerned to get through with it by one means or another.

It is true that trial courts have considerable latitude of discretion but when its exercise runs markedly in one direction, as here, and owners are cut off from the only means which are available to measure market value, one after another, the abuse outweighs the discretion.

Appellants submit that on either, and particularly on both, of the grounds herein advanced, the judgment should be reversed and the cause should be remanded.

H. G. SLOANE
RUBIN AND SELTZER
JAMES L. FOCHT, JR.
by H. G. Sloane
Attorneys for Appellants

APPENDIX

SUMMARY OF VALUATIONS[6/]
(14 month term)

	Government		Landowner		Verdict
Parcel 5	Seeley		Shattuck		
(Bldg. 4)	$55,524	B	$133,910	B	
(Assemblies)	938	P	3,990	P	
	$56,462	T	$137,900	T	
	Mitchell		Culver		
	$43,680	B	$108,500	B	
	1,070	P	3,500	P	
	$44,750	T	$112,000	T	
	Cotton		Goodwin		
	$32,400	B	$118,202	B	
	500	P	1,974	P	
	$32,900	T	$120,176	T	$62,000 - Term Total
			Sayer		
			$107,540	B	$ 1,600 -
			2,906	P	Parking
			$110,446	T	(incl. in total)
Option to renew	Seeley		Shattuck		
	$ 7,258		$ 30,000		
	Mitchell		Culver		
	$ 6,400		$ 30,720		
	Cotton		Goodwin		
	$ 4,700		$ 34,336		
			Sayer		
			$ 32,532		$17,712

6/ B - basic rent.
P - parking allocation.
T - total rent.

SUMMARY OF VALUATIONS
(14 month term)

	Government		Landowner		Verdict
Parcel 6 (Bldg. 2) (Assemblies)	Seeley		Shattuck		
	$130,172	B	$337,820	B	
	6,888	P	10,080	P	
	$137,060	T	$347,900	T	
	Mitchell		Culver		
	$138,600	B	$387,800	B	
	7,875	P	18,200	P	
	$146,475		$406,000		
	Cotton		Goodwin		
	$ 76,125	B	$359,562	B	
	1,100	P	6,608	P	
	$777,625	T	$366,170	T	Total $185,000 (incl. $8,600 parking)
	Cotton Revised		Sayer		
	$119,000	B	$352,917	B	
	1,750	P	9,560	P	
	$120,750	T	$362,477	T	
Option to renew	Seeley		Shattuck		
	$ 17,622		$120,000		
	Mitchell		Culver		
	$ 21,000		$111,360		
	Cotton		Goodwin		
	$ 17,250		$104,620		
			Sayer		
			$106,768		$52,856

SUMMARY OF VALUATIONS
(14 month term)

	Government		Landowner		Verdict
Parcel 7 (Bldg. 3) (Assemblies)	Seeley		Shattuck		
	$139,762	B	$366,380	B	
	7,350	P	10,920	P	
	$147,112	T	$377,300	T	
	Mitchell		Culver		
	$149,100	B	$407,400	B	
	8,440	P	19,600	P	
	$157,540	T	$427,000	T	
	Cotton		Goodwin		
	$134,400	B	$388,430	B	
	2,100	P	7,140	P	
	$136,500	T	$395,570	T	Total $202,000 (incl. $9,550 to parking)
			Sayer		
			$381,544	B	
			10,334	P	
			$391,878	T	
Option to renew	Seeley		Shattuck		
	$ 18,914		$130,000		
	Mitchell		Culver		
	$ 22,500		$117,120		
	Cotton		Goodwin		
	$ 10,500		$113,020		
			Sayer		
			$115,428		$57,684

SUMMARY OF VALUATIONS
(14 month term)

	Government		Landowner		Verdict
Parcel 9A (Bldgs. 1, 5, 7, 24, 27) (Carlstrom)	Seeley		Shattuck		
	$264,586	B	$507,267	B	
	17,906	P	15,400	P	
	$282,492	T	$522,667	T	
	Mitchell		Culver		
	$263,900	B	$607,600	B	
	20,675	P	22,400	P	
	$284,575	T	$630,000	T	
	Cotton		Goodwin		
	$272,500	B	$554,820	B	
	7,500	P	10,444	P	Total
	$280,000	T	$565,264	T	$315,000 (incl.
			Sayer		$10,850 to
			$561,017	T	parking)
			41,312	P	
Option to renew	Seeley		Shattuck		
	$ 36,320		$150,000		
	Mitchell		Culver		
	$ 40,000		$172,800		
	Cotton		Goodwin		
	$ 40,000		$161,504		
			Sayer		
			$165,248		$90,000

SUMMARY OF VALUATIONS
(14 month term)

	Government		Landowner		Verdict
Parcel 9B (disputed ownership)	Seeley		Shattuck		
	$ 560	B		B	
	140	P	--	P	
	$ 700	T	$ 840	T	
	Mitchell		Culver		
	$ 560	B	$	B	
	170	P	--	P	
	$ 730	T	$ 1,050	T	
	Cotton		Goodwin		
	$ 770	B	$ 1,064	B	
	70	P	--	P	Total $700
	$ 840	T	$ 1,064	T	(including $100 for parking)
			Sayer		
			$ 1,032	T	
Option to renew	Seeley		Shattuck		
	$ 90		$ 50		
	Mitchell		Culver		
	$ 100		$ 288		
	Cotton		Goodwin		
	$ 120		$ 304		
			Sayer		
			$ 304		$200

SUMMARY OF VALUATIONS
(14 month term)

	Government		Landowner		Verdict
Parcel 9C (Spur railroad tracks) (Carlstrom)	Seeley		Shattuck		
	--	B	--	B	
	--	P	--	P	
	$ 5,565	T	$ 7,560	T	
	Mitchell		Culver		
	--	B	--	B	
	--	P	--	P	
	$ 7,000	T	$ 8,400	T	
	Cotton		Goodwin		
	--	B	--	B	
	--	P	--	P	
	$ 7,000	T	$ 8,344	T	No verdict Settled by Compromise
			Sayer		
			--	B	
			--	P	
			$ 8,433	T	
Option to renew	Seeley		Shattuck		
	$ 727		$ 2,500		
	Mitchell		Culver		
	$ 1,000		$ 2,304		
	Cotton		Goodwin		
	$ 1,000		$ 2,384		
			Sayer		
			$ 2,484		

SUMMARY OF VALUATIONS
(14 month term)

	Government	Landowner	Verdict
Parcel X (Bldg. 28) (Salvation Army)	Seeley	Shattuck	
	$ 15,442 B	$ 15,302 B	
	700 P	448 P	
	$ 16,142 T	$ 15,750 T	
	Mitchell	Culver	
	$ 14,560 B	$ 20,160 B	
	670 P	840 P	
	$ 15,230 T	$ 21,000 T	
	Cotton	Goodwin	
	$ 12,600 B	$ 14,784 B	
	350 P	266 P	
	$ 12,950 T	$ 15,050 T	Total $12,000 (incl. $405 for parking)
		Sayer	
		$ 16,296 T	
		448 P	
Option to renew	Seeley	Shattuck	
	$ 2,075	$ 5,000	
	Mitchell	Culver	
	$ 2,200	$ 5,760	
	Cotton	Goodwin	
	$ 1,850	$ 4,300	
		Sayer	
		$ 4,800	$3,428

SUMMARY OF VALUATIONS
(Fee)

	Government		Landowner		Verdict
Tract A-100 (Bldg. 8) Business properties Inc.)	Seeley		Stallard		
	$191,000	B	$ 468,310	B	
	8,000	P	11,690	P	
	$199,000	T	$ 480,000	T	
	Mitchell				
	$191,000	B			
	9,000	P			
	$200,000	T			
					$275,000 (incl. $7,500 for parking)
	Cotton				
	$204,000	B			
	10,000	P			
	$214,000	T			
Tract A-101 (Bldg. 1) (Salvation Army)	Seeley		Shattuck		
	$553,000	B	$2,526,000	B	
	34,500	P	49,000	P	
	$587,500	T	$2,575,000	T	
	Mitchell		Culver		
	$462,000	B	$	B	
	38,000	P	83,000	P	
	$500,000	T	$2,650,000	T	
	Cotton		Goodwin		
	$563,700	B	$1,925,000	B	
	44,000	P	32,000	P	
	$607,700	T	$2,457,000	T	$1,146,000 (incl. $49,600 for parking)
			Sayer		
			$2,385,000	B	
			48,000	P	
			$2,433,000	T	

SUMMARY OF VALUATIONS
(Fee)

	Government	Landowner	Verdict
Tract A-102 (Bldgs. 2, 3, 4, 28) (Assemblies)	Seeley	Shattuck	
	$1,648,500 B	$5,915,000 B	
	90,000 P	$ 112,000 P	
	$1,738,500 T	$6,027,000 T	
	Mitchell	Culver	
	$1,365,000 B	$6,115,000 B	
	100,000 P	185,000 P	
	$1,465,000 T	$6,300,000 T	
	Cotton	Goodwin	
	$1,635,000 B	$5,950,000 B	
	115,000 P	79,500 P	
	$1,750,000 T	$6,028,500 T	$2,830,000 (incl.
		Sayer	$111,500
		$5,787,000 B	for
		115,000 P	parking)
		$5,902,000 T	
Tract A-106 (disputed Convair, Assemblies and Salvation Army)	Seeley	Shattuck	
	$ 6,600 B	$ B	
	600 P	-- P	
	$ 6,600 T	$ 7,500 T	
	Mitchell	Culver	
	$ 6,800 B	$ B	
	700 P	-- P	
	$ 7,500 T	$ 10,000 T	
	Cotton	Goodwin	
	$ 5,850 B	B	
	650 P	-- P	
	$ 6,500 T	$ 9,000 T	$30,000 (incl. $700
		Sayer	for
		B	parking)
		-- P	
		$ 10,000	

SUMMARY OF VALUATIONS
(Fee)

	Government		Landowner		Verdict
Tract A-107	Seeley		Shattuck		
(Bldg. 24)	$ 49,000	B	$ 75,500	B	
(Children's	2,500	P	1,500	P	
Aid)	$ 51,500	T	$ 77,000	T	
	Mitchell		Culver		
	$ 42,000	B	$	B	
	3,000	P	--	P	
	$ 45,000	T	$ 80,000		
	Cotton		Goodwin		
	$ 52,000	B	$ 75,000	B	
	3,000	P	900	P	
	$ 55,000	T	$ 75,900	T	
					$49,000
			Sayer		(incl.
			$ 80,000	B	$1,300 for
			1,500	P	parking)
			$ 81,500	T	
Tract A-108	Seeley		Shattuck		
(Bldg. 27)	$107,000	B	$174,000	B	
(Salvation	7,000	P	$ 3,000	P	
Army)	$114,000	T	$177,000	T	
	Mitchell		Culver		
	$ 72,000	B			
	8,000	P	$ 4,500	P	
	$ 80,000	T	$200,000	T	
	Cotton		Goodwin		
	$111,500	B	$	B	
	8,500	P	2,100	P	
	$120,000	T	$164,100	T	$122,000
					(incl.
			Sayer		$2,400 for
			$171,000	B	parking)

SUMMARY OF VALUATIONS
(Fee)

	Government		Landowner		Verdict
Tract A-109 (Bldg. 7) (Carlstrom)	Seeley		Shattuck		
	$154,500	B	$355,000	B	
	10,500	P	6,500	P	
	$165,000	T	$361,500	T	
	Mitchell		Culver		
	$128,000	B	$321,000	B	
	12,000	P	9,000	P	
	$140,000	T	$330,000	T	
	Cotton		Goodwin		
	$152,000	B	$339,000	B	
	13,000	P	4,500	P	
	$165,000	T	$343,500	T	
					$195,000 (incl.
			Sayer		
			$347,000	B	$5,400 for
			7,000	P	parking)
			354,000	T	
Tract A -120 (S. water tank) (Assemblies and Salvation Army jointly)	Seeley		Shattuck		
	$ 14,000	B		B	
	1,000	P	--	P	
	$ 15,000	T	$ 37,500	T	
	Mitchell		Culver		
	$ 19,000	B	$	B	
	1,000	P	--	P	
	$ 20,000	T	$ 46,000	T	
	Cotton		Goodwin		
	$ 14,000	B	$		
	1,000	P	--	P	
	$ 15,000	T	$ 44,000	T	$22,000 (incl. $300
			Sayer		for
			$	B	parking)
			--	P	

SUMMARY OF VALUATIONS
(Fee)

	Government		Landowner		Verdict
Tract A-121 (Bldg. 5 and N. Water tanks) (Assemblies and Salvation Army jointly)	Seeley		Shattuck		
	$126,500	B	$378,000	B	
	4,500	P	12,000	P	
	$131,000	T	$386,000	T	
	Mitchell		Culver		
	$150,000	B	$		
	5,000	P	--	P	
	$155,000	T	$400,000	T	
	Cotton		Goodwin		
	$162,000	B	$		
	3,000	P	--	P	
	$165,000	T	$330,000	T	
					$208,000 (incl. $1,700 for parking)
			Sayer		
			$	B	
			--	P	
			$409,000		

FOR THE NINTH CIRCUIT

No. 16128

CHARLES W. CARLSTROM, et al,

Appellants,

vs.

SUMMARY OF VALUATIONS
(Fee)

	Government		Landowner		Verdict
Tract A-121 (Bldg. 5 and N. Water tanks) (Assemblies and Salvation Army jointly)	Seeley		Shattuck		
	$126,500	B	$378,000	B	
	4,500	P	12,000	P	
	$131,000	T	$386,000	T	
	Mitchell		Culver		
	$150,000	B	$		
	5,000	P	--	P	
	$155,000	T	$400,000	T	
	Cotton		Goodwin		
	$162,000	B	$		
	3,000	P	--	P	
	$165,000	T	$330,000	T	
					$208,000 (incl. $1,700 for parking)
			Sayer		
			$	B	
			--	P	
			$409,000		

FOR THE NINTH CIRCUIT

No. 16128

CHARLES W. CARLSTROM, et al,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN DIEGO)

Rita Thaanum, being first duly sworn, deposes and says: That this affiant is a citizen of the United States of America, a resident of the County of San Diego, over the age of eighteen years, not a party to the within and above entitled action; that this affiant is making this service for H. G. Sloane, Rubin and Seltzer and James L. Focht, Jr., the attorneys for Appellants in this action; that this affiant is of the firm of San Diego Offset Printing Company, 930-8th Avenue, who are the printers and agents in this matter for said attorneys, and have their offices in the City of San Diego, State of California.

That on the 14th day of July, 1959, affiant served the within Appellants' Opening Brief on the Appellee in this action by placing true copies thereof in envelopes addressed to the attorneys of record sx for said Appellee at the business addresses of said attorneys, as follows: three copies thereof to Laughlin E. Waters, United States Attorney, Albert N. Minton, Assistant United States Attorney, 821 Federal Building, Los Angeles 12, California; three copies thereof to Perry W. Morton, Assistant Attorney General, Rogert P. Marquis, Chief, Appellate Division, Lands Division, United States Department of Justice, Washington 25, D.C.; and then sealing said envelopes and depositing the same, with postage thereon fully prepaid, in the United States Post Office at San Diego, California.

That there is delivery service by United States mail at the places so addressed or there is a regular communication by mail between the place of mailing and the places so addressed.

Rita Thaanum

Rita Thaanum

Subscribed and sworn to before me
this 14th day of July, 1959.

Laura Thaanum

Laura Thaanum
Notary Public in and for said
County and State

(SEAL)

My [illegible] Expires [illegible] 24, 1959